Hong Leong MSIG Takaful Bhd (previously known as Hong Leong Tokio Marine Takaful Bhd) v Shantawood Manufacturing Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-1798–10 OF 2014
LIM YEE LAN, VARGHESE GEORGE AND IDRUS HARUN JJCA
23 AUGUST 2016

Insurance — Fire insurance — Claim on policy — Fire occurred on buildings or factories of manufacturing company — Adjusters appointed by insurer requested for detailed documents — Whether insured company provided full cooperation — Continuous demand for documents by adjusters — Whether reasonable time given — Insured company raised complaint to insurer — Insurer declared that insured company unwilling to cooperate which resulted in repudiation of liability by insurer — Allegation of fraud — Whether correct standard of proof applied in assessing allegation of fraud — Whether fire started by insured company's connivance

The respondent was in the business of manufacturing furniture and had plant located on a large piece of land consisting of more than 20 buildings or factories. The entire land comprised numerous plots. The respondent had insured the factories on the land with the appellant by way of three Takaful certificate policies. The respondent's policies with the appellant covered building, plant, machineries and office equipment as well as mechanical and electrical. Separate fires occurred at different times and locations on the respondent's insured furniture factory premises. Due to the fire, the respondent suffered losses on the buildings, plant and machineries as well as stocks. The respondent informed the appellant of the fire immediately upon learning of the incident. The adjusters appointed by the appellant requested for detailed documents and the respondent provided full cooperation. However, the adjusters' continuous demand for documents with unreasonable time frame led the respondent to raise a complaint to the appellant. The adjusters in turn declared that the respondent was unwilling to cooperate which resulted in due course in the repudiation of the liability by the appellant on this ground. The respondent attempted to resolve their claim amicably however to no avail and as events transpired, the respondent commenced the present action against the appellant. The High Court found the appellant liable and consequently allowed the claim on a reduced sum of RM19,496,298.90 with interest at 5%pa until full settlement of the judgment sum. Hence, the present appeal. The issues that arose for the court's determination were whether the High Court judge ('the judge') had applied the correct standard of proof when

A assessing the allegation of fraud in civil cases in respect of the present action; whether the respondent's financial standing prior to the fire was a clear motive in their act of submitting a fraudulent and exaggerated claim; and whether the fire was started with the respondent's connivance.

B **Held**, allowing the appeal in part:

(1) The law on the applicable standard of proof in civil cases where fraud is alleged had changed in view of the Federal Court's decision in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* ('Sinnaiyah'). The Federal Court in *Sinnaiyah* had clearly decided that the decision applied to future cases. The phrase 'future cases' in *Sinnaiyah* is considered to cover an on going appeal such as the present appeal. Therefore, as far as this appeal was concerned, the court was duty bound to apply the law as it presently stood. Having considered the evidence, and even by applying the balance of probabilities standard of proof, the appellant failed to prove fraud against the respondent. The appellant thus failed to pass the threshold of standard of proof presently applicable in civil cases in order to prove fraud against the respondent (see para 15).

(2) It would make no commercial sense for the respondent to set their own premises on fire. The unfavourable financial standing should not and could not amount to grounds for alleging fraud. The adjusters' allegation that the respondent was in the red and that it brewed motive was therefore wholly devoid of any merits. Furthermore, the person who prepared the adjusters' report was not called to testify. The reliance by the appellant on this unproven motive was a failure from the outset (see para 18).

(3) Even up to the completion of the investigation, there were still hot embers as a result of the fires and wind as well as the hot embers played a vital role in the fire. It was also not disputed that almost at all times during the fire, the Fire and Rescue Department personnel were present at the respondent's premises. It would be a very bold act for the respondent to be able to start the fire at any part of their premises whilst the personnel of the Fire and Rescue Department were carrying out firefighting efforts at the scene of the incident. The allegation that the respondent was the arsonist remained as a mere suspicion. There was absolutely no evidence that could lend credence to the suspicion or otherwise convincingly convert this suspicion into a proven fact (see para 22).

(4) It was unreasonable to expect documents during the period when the fire was still raging. In fact there were numerous letters requesting for more documents and detailed quotations which kept the respondent in an endless loop of paper work and submission that never satisfied the adjusters. The appellant chose not to highlight to the court an email from the managing director of the adjusters stating 'We are not saying that the

participant had not cooperated with us and has not submitted anything to date' and held that this was a clear admission by the adjusters that the respondent had cooperated and had been submitting documents as requested. The respondent's claim was huge and they would require time to produce the documents. Such request and delay in providing the documents was not a blatant disregard of any express term of the Takaful contract (see paras 32–34).

(5) On the issue of liability, there was ample evidence to prove that the respondent had suffered losses and damage due to the fires which occurred on their premises at the relevant time. The court agreed with the findings of the judge that the appellant was liable under the Takaful certificates or policies. However, as far as the issue of quantum was concerned, the judge erred in misapprehending the law and evidence in allowing the respondent's claim in the sum of RM19,496,398.90 based solely and entirely on the evidence of the quotations submitted by the respondent's contractors. The rejection of the appellant's adjusters' quantum report was in contravention of s 12 of the Evidence Act 1950 which treats such report as relevant in determining the appropriate damages to be awarded (see para 62).

(6) The judge erred in imposing a burden on the appellant to disprove the respondent's claim who bore the burden to prove their claim. The other issues deliberated would make it necessary for the appropriate quantum to be assessed by the judge. The decision of the judge so far as it relates to her finding of liability against the respondent under the three Takaful certificates or policies was affirmed. However, appellate intervention was required insofar as the judge's decision on quantum was concerned. The appeal on quantum was allowed and the case was remitted back to the High Court for reassessment of damages before another High Court judge, with liberty to both parties to adduce all relevant evidence for the purpose of assessment of damages. The costs of RM50,000 awarded by the judge was reduced to RM25,000 with no order as to costs (see para 62).

[Bahasa Malaysia summary

Responden dalam perniagaan membuat perabot dan mempunyai tapak yang terletak atas sebidang tanah yang luas dengan lebih daripada 20 bangunan atau kilang. Keseluruhan tanah itu terdiri daripada pelbagai plot. Responden telah menginsurankan kilang-kilang atas tanah tersebut dengan perayu melalui tiga polisi takaful. Polisi-polisi responden dengan perayu melindungi bangunan, tapak, mesin dan peralatan pejabat dan juga mekanikal dan elektrikal. Kebakaran berasingan telah berlaku pada masa dan lokasi berbeza atas premis kilang perabot responden. Akibat kebakaran itu, responden mengalami kerugian ke atas bangunan, tapak dan mesin juga saham. Responden telah memberitahu perayu tentang kebakaran itu dengan segera sejurus mendapat

tahu mengenai kejadian itu. Pelaras-pelaras yang dilantik oleh perayu meminta dokumen terperinci dan responden telah memberikan kerjasama penuh. Walau bagaimanapun, tuntutan berterusan pelaras-pelaras untuk dokumen tersebut dengan tempoh masa yang tidak munasabah menyebabkan responden membuat aduan kepada perayu Pelaras-pelaras itu sebaliknya telah memberitahu bahawa responden tidak mahu bekerjasama sehingga menyebabkan akhirnya penyangkalan liabiliti oleh perayu atas alasan ini. Responden telah cuba menyelesaikan tuntutan mereka secara aman namun begitu tidak berjaya dan selepas kejadian itu berlaku, responden telah memulakan tindakan ini terhadap perayu. Mahkamah Tinggi mendapati perayu bertanggungjawab dan seterusnya membenarkan tuntutan itu pada jumlah yang dikurangkan iaitu RM19,496,298.90 dengan faedah pada kadar 5% setiap tahun sehingga penyelesaian penuh jumlah penghakiman. Justeru, rayuan ini. Isu-isu yang timbul untuk penentuan mahkamah adalah sama ada hakim Mahkamah Tinggi ('hakim tersebut') telah mengunakan piawai bukti yang betul semasa menilai dakwaan fraud dalam kes sivil berhubung kes ini; sama ada kedudukan kewangan responden sebelum kebakaran itu adalah motif jelas dalam tindakan mereka mengemukakan tuntutan yang berunsur fraud dan berlebihan; dan sama ada kebekaran itu bermula dengan perbuatan menyalahi undang-undang responden.

Diputuskan, membenarkan sebahagian daripada rayuan:

(1) Undang-undang berhubung piawai bukti yang terpakai dalam kes sivil di mana fraud dikatakan telah mengubah pendapat keputusan Mahkamah Persekutuan dalam kes *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* ('*Sinnaiyah*'). Mahkamah Persekutuan dalam kes *Sinnaiyah* jelas telah memutuskan bahawa keputusan itu terpakai kepada kes masa hadapan. Frasa 'future cases' dalam kes *Sinnaiyah* dianggap meliputi rayuan yang sedang berjalan seperti rayuan ini. Oleh itu, setakat mana rayuan ini adalah berkaitan, mahkamah terikat dengan kewajipan untuk menggunakan undang-undang sepertimana ia berkuat kuasa. Setelah mempertimbangkan keterangan, dan malah dengan mengguna pakai imbangan kebarangkali piawai bukti, perayu telah gagal untuk membuktikan fraud terhadap responden. Perayu dengan itu telah gagal untuk lulus ambang piawai bukti yang kini terpakai dalam kes sivil bagi tujuan membuktikan fraud terhadap responden (lihat perenggan 15).

(2) Ia tidak masuk akal secara komersial bagi responden untuk menetapkan premis mereka sendiri berhubung kebakaran itu. Kedudukan kewangan yang tidak berpihak tidak patut dan tidak boleh merupakan alasan bagi dakwaan fraud. Pengataan pelaras-pelaras bahawa responden dalam keadaan teruk dan ia menimbulkan motif oleh itu secara keseluruhannya tidak mempunyai apa-apa merit. Tambahan pula, orang yang menyediakan laporan pelaras-pelaras itu tidak dipanggil untuk memberi keterangan. Kebergantungan oleh perayu atas motif yang tidak

dibuktikan adalah satu kegagalan dari mula lagi (lihat perenggan 18). A

(3) Sehingga selesai siasatan, masih terdapat bara api akibat kebakaran dan angin dan juga bara api yang memainkan peranan penting dalam kebakaran itu. Ia juga tidak dipertikaikan bahawa hampir sepanjang masa kebakaran itu, penjawat Jabatan Api dan Penyelamat berada di premis responden. Ia adalah tindakan berani jika responden berupaya memulakan api di mana-mana bahagian premis mereka manakala penjawat Jabatan Api dan Penyelamat sedang menjalankan usaha melawan api di tempat kejadian itu. Pengataan bahawa responden merupakan orang yang membakar itu masih kekal sebagai hanya satu syak wasangka. Tiada keterangan langsung yang memberi kepercayaan kepada syak wasangka itu atau sebaliknya dengan meyakinkan menukar syak wasangka ini kepada satu fakta yang dibuktikan (lihat perenggan 22). B C D

(4) Ia tidak munasabah untuk mengharapkan dokumen-dokumen sepanjang tempoh apabila api itu masih mara. Bahkan terdapat pelbagai surat memohon untuk dokumen lagi dan sebut harga terperinci yang menyebabkan responden sentiasa sibuk dengan kertas kerja dan yang dikemukakan itu yang tidak pernah memuaskan pelaras-pelaras itu. Perayu memilih untuk tidak mengutarakan kepada mahkamah satu emel daripada pengarah urusan tentang pelaras-pelaras yang menyatakan stating 'We are not saying that the participant had not cooperated with us and has not submitted anything to date' dan memutuskan bahawa ini adalah pengakuan jelas oleh pelaras-pelaras bahawa responden telah bekerjasan dan telah mengemukakan dokumen-dokumen yang dipohon. Tuntutan responden adalah besar dan ia akan memerlukan masa untuk mengemukakan dokumen-dokumen bukan suatu yang tidak menghiraukan langsung apa-apa terma nyata kontrak Takaful itu (lihat perenggan 32–34). E F G

(5) Berhubung isu liabiliti, terdapat keterangan yang mencukupi untuk membuktikan bahawa responden telah mengalami kerugian dan kerosakan akibat kebakaran yang berlaku di premis mereka pada masa relevan itu. Mahkamah bersetuju dengan penemuan hakim bahawa perayu bertanggungjawab di bawah polisi atau sijil takaful. Walau bagaimanapun, setakat mana isu kuantum adalah berkaitan, hakim telah terkhilaf dalam menafsir undang-undang dan keterangan apabila membenarkan tuntutan responden untuk jumlah RM19,496,398.90 berdasarkan semata-mata dan keseluruhan pada keterangan berhubung sebut harga yang dikemukakan oleh kontraktor-kontraktor responden. Penolakan laporan kuantum pelaras-pelaras perayu adalah bertentangan dengan s 12 Akta Keterangan 1950 yang menganggap laporan sedemikian sebagai relevan dalam menentukan ganti rugi sesuai untuk diawardkan (lihat perenggan 62). H I

(6) Hakim telah terkhilaf dalam mengenakan beban ke atas perayu untuk tidak membuktikan tuntutan responden yang mempunyai beban untuk membuktikan tuntutan mereka. Isu-isu lain yang perlu diputuskan membuat ia perlu untuk kuantum sesuai ditaksir oleh hakim. Keputusan hakim setakat mana ia berkaitan dengan penemuan beliau tentang liabiliti terhadap responden di bawah tiga sijil atau polisi Takaful itu telah disahkan. Walau bagaimanapun, campur tangan perayu dikehendaki setakat mana keputusan hakim berhubung kuantum adalah berkaitan. Rayuan berhubung kuantum itu dibenarkan dan kes itu telah diremitkan kembali kepada Mahkamah Tinggi untuk penaksiran semula ganti rugi di hadapan hakim Mahkamah Tinggi, dengan kebebasan kepada kedua-dua pihak mengemukakan semua keterangan relevan bagi tujuan penaksiran ganti rugi. Kos RM50,000 yang diawardkan oleh hakim telah dikurangkan kepada RM25,000 tanpa perintah untuk kos (lihat perenggan 62).]

Notes

For cases on claim on policy, see 8(1) *Mallal's Digest* (5th Ed, 2015) paras 135–142.

Cases referred to

Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45; [1997] 1 CLJ 497, FC (refd)

Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor [2014] 4 MLJ 619; [2014] 2 CLJ 773, CA (refd)

Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301, FC (refd)

Broughton Park Textiles (Salford) Ltd v Commercial Union Assurance Co Ltd [1987] 1 Lloyd's Rep 194, QBD (distd)

Eastern Enterprises Ltd v Ong Choo Kim [1969] 1 MLJ 236 (refd)

Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99, FC (refd)

JCT Limited v Muniandy Nadasan & Ors and another appeal [2016] 3 CLJ 692, CA (folld)

Regina Fur Co Ltd v Bossom (1958) 2 Lloyd's 425, CA (refd)

S and M Carpets (London) Ltd v Cornhill Insurance Co Ltd [1981] 1 Lloyd's Rep 667, QBD (distd)

Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1, FC (refd)

Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777; [1995] 1 CLJ 15, FC (refd)

Watkins and Davis Ltd v Legal and General Assurance Co Ltd [1981] 1 Lloyd's Rep 674, QBD (distd)

Yong Tim v Hoo Kok Chong & Anor [2005] 3 CLJ 229, FC (refd)

Legislation referred to

Evidence Act 1950 ss 12, 73A(1)
Penal Code s 438

Appeal from: Civil Suit No 22NCVC-1488–12 of 2012 (High Court, Shah Alam)

YM Tunku Farik Ismail (Tan Sixin with him) (Azim, Tunku Farik & Wong) for the appellant.
Jaqdip Singh a/l Jesbier Singh (Karamjit Kaur a/p Jasvant Singh with him) (Karamjit & Jaq) for the respondent.

Idrus Harun JCA (delivering judgment of the court):

PRELIMINARIES

[1] On 10, 13 and 14 July 2011, six to seven separate fires occurred at different times and locations on the respondent's insured furniture factory premises. As a result, the respondent allegedly suffered losses and damages amounting to the initial sum of RM24,219,074. Subsequently, the respondent, by way of a writ of summons and statement of claim, sought payment of the above-mentioned sum from the appellant, a Takaful operator from whom the respondent had procured three Takaful certificates or policies. The High Court found the appellant liable and consequently allowed the claim on a reduced sum of RM19,496,298.90 with interest at 5%pa until full settlement of the judgment sum. We heard the appeal against the decision of the learned judge in allowing the respondent's claim. At the conclusion of the arguments by both learned counsel, we reserved our decision. On 22 April 2016, we allowed the appeal in part. We affirmed the decision of the learned judge so far as it concerned Her Ladyship's findings of liability of the appellant to pay under the three Takaful certificates. However, we allowed the appeal on quantum and ordered that the case be remitted back to the High Court for reassessment of damages before another High Court judge with liberty to both parties to adduce all material evidence for the said purpose.

[2] We shall lay down the summary of some of the material facts first and thereafter consider the merits of the appeal and give our reasons for our decision.

SUMMARY OF MATERIAL FACTS

[3] We begin by stating the uncontroverted facts that the respondent, who was the plaintiff in the court below, was at the material time, in the business of manufacturing furniture and its market was almost exclusively for export. They had a manufacturing plant in Melaka located on a large piece of land of

A approximately 20 acres at Lots 76 and 77, Kawasan Perindustrian Bukit Rambai, Melaka, consisting of more than 20 buildings or factories. The entire land comprised numerous plots.

[4] The respondent had insured the factories on the land with the appellant
B (the defendant in the High Court) and one other insurance company not related to this suit. The respondent's policies with the appellant covered building, plant, machineries and office equipment as well as mechanical and electrical. The facts that can be discerned from the pleadings disclose that the respondent had procured and paid all the premiums in full for the following
C three Takaful certificates:

(a) Fire Material Damage Takaful Certificate on the buildings etc at Lots 64–68 and 76–78 with a total sum insured of RM14.4m;

(b) All Risks Takaful Certificate on properties etc at Lots 64–68, 76–77 with
D a total sum insured of RM600,000; and

(c) Machinery & Equipment Takaful Certificate on industrial machineries etc at Lots 64–68 and 76–78 with a total sum of RM12m.

E **[5]** The fire was alleged to have started in the morning of 10 July 2011 circa 0.46am. It is not disputed that the fire started at the raw material storage area and was first seen by the respondent's employees namely Tharumalingam a/l Odayani ('PW1') and Chandu ('PW2'). Upon seeing the fire, PW1 immediately told the guard at the guard post to call the Fire and Rescue
F Department. In the meantime, PW1 and PW2 had attempted to contain and put out the fire with firefighting equipment but was in vain. Unable to contain the fire, PW1 and PW2 then started evacuating the hostel area where other workers of the respondent were sleeping. The Fire and Rescue Department arrived to a raging fire within minutes upon being informed and found the
G raging fire spreading very fast due to the wind. There were sparks and few explosions due to the short circuiting cables as the electricity had yet to be disconnected.

[6] Due to the fire that had occurred, the respondent suffered losses on the
H buildings, plant and machineries as well as stocks. Under the Takaful certificates, the respondent was only able to insure the buildings and plant as well as machineries at the cover of between 65%–75%, with an excess limited to between 5%–15% and self-insured to the tune of 20%. In simple terms, where there is a fire, the appellant only pays between 65%–75%, and the rest
I are losses that are not recoverable.

[7] The respondent informed the appellant of the fire immediately upon learning of the incident. The appellant thereupon appointed an adjusting firm namely, Century Independent Loss Adjusters Sdn Bhd ('the adjusters'). The

adjusters wrote for documents and the respondent complied and this was followed with requests for more or even further detailed documents which the adjusters had collected from time to time. It was the respondent's case that they had provided full cooperation to the adjusters. However the adjusters' continuous demand for documents with unreasonable time frame had led the respondent to raise a complaint to the appellant. According to the respondent, the adjusters had repeatedly sought for more details on repair costs and quotations obtained by the respondent. But, despite doing their best to secure further documents and details as requested by the adjusters, the respondent stated that such efforts took time as the quotation providers were third parties and not within their control. Consequently, the respondent sought a meeting with the appellant to iron out the issue of outstanding documents. The adjusters in turn declared that the respondent was unwilling to cooperate which resulted in due course in the repudiation of the liability by the appellant on this ground.

[8] The respondent had attempted to resolve their claim amicably however to no avail and as events transpired, the respondent commenced the present action against the appellant.

BURDEN OF PROOF

[9] For the appellant, it was contended that the learned judge had applied the wrong standard of proof when assessing the allegation of fraud in civil cases in respect of the present action. To appreciate the contention that had been raised, it is to be remembered that the issue of fraud arose as the appellant's defence, inter alia, was premised on the allegation of fraud the details of which were set out in para 24 of the statement of defence which quite clearly alleged suspected arson based on fire incidents which the appellant claimed had suspiciously occurred. Learned counsel for the appellant referred to the recent Federal Court's decision in the case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1 delivered on 10 August 2015 which set the applicable standard of proof in civil proceedings of facts amounting to the commission of a crime to be only on a balance of probabilities. However, it is of some significance to mention on this issue that the Federal Court had also made it clear that the judgment only applied to *Sinnaiyah* and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims. The decision of the High Court in the present action, it is to be observed, was delivered on 26 September 2014 almost 11 months before the Federal Court delivered its decision in *Sinnaiyah*. Therefore, the learned judge, in the present case had correctly determined that the existing applicable standard in civil cases involving the allegation of fraud at that material time was beyond reasonable doubt. This case obviously does not fall within the category of future cases mentioned by the Federal Court in *Sinnaiyah* when the learned judge delivered her decision. It is the case which was decided well before

Sinnaiyah.

[10] The learned judge whilst delivering her judgment on this issue had weighed and assessed the available precedents viz:

(a) *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301;

(b) *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45; [1997] 1 CLJ 497; and

(c) *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229.

The learned judge then deduced that according to the underlying principles clearly laid down in the above mentioned cases by the Federal Court, the burden of proof that ought to be applied was 'beyond reasonable doubt' as opposed to the contention of the appellant that it should be 'on the balance of probabilities'. Needless to say, these decisions, being the decisions of the apex court, were binding on the High Court. Having considered the evidence, the learned judge held that the circumstantial evidence adduced before the court by the appellant showed that the appellant had failed to discharge the burden of establishing fraud allegedly committed by the appellant. The learned judge's decision was not per incuriam as she was clearly bound by the Federal Court's decisions which she had cited.

[11] Learned counsel for the appellant then urged this court, for the purpose of this appeal, to apply the new standard of proof as laid down by the Federal Court in *Sinnaiyah*. He further added that the appellant had been relying on the respondent's breaches of conditions under the Takaful certificates as their defence in this action. As such, this case was a straightforward contractual matter where the applicable standard of proof had always been on a balance of probabilities only, and no other. To support this argument, learned counsel pointed out that this fact was clearly manifested in paras 10–24 of the appellant's statement of defence. Therefore without the hindsight of *Sinnaiyah*'s decision, the appellant submitted, the correct standard of proof had always been on a balance of probabilities only and the strong circumstantial evidence was sufficient to discharge such standard of proof.

[12] The appellant might be relying on the alleged breaches of the conditions under the policy though it may seem, however, such reliance in no way detract from the fact that in para 24 of the statement of defence, the appellant had put forward an alternative defence of suspected arson which the learned judge had correctly stated that arson was a criminal offence under s 438 of the Penal Code. The allegation of fraud was therefore founded on the

commission of the alleged offence. The learned judge was correct when she held that the standard of proof required, based on the law as it stood then, was beyond reasonable doubt.

[13] In the course of his submission, learned counsel for the appellant had also referred to the English authorities on the issue of the applicable standard of proof and these were *S and M Carpets (London) Ltd v Cornhill Insurance Co Ltd* [1981] 1 Lloyd's Rep 667, *Watkins and Davis Ltd v Legal and General Assurance Co Ltd* [1981] 1 Lloyd's Rep 674 and *Broughton Park Textiles (Salford) Ltd v Commercial Union Assurance Co Ltd* [1987] 1 Lloyd's Rep 194. These cases were, in our view, based on distinctly different facts. In the present action there was not an iota of evidence to show that the fire had been started by the respondent as was in *S and M Carpets (London) Ltd* where it was by circumstantial evidence shown that the fire had been started by the insured's managing director. There was also in the present appeal, no evidence that the fire was caused by the respondent or that an intruder could not have gained access into the premises as was in *Watkins & Davis Ltd*. The case of *Broughton Park Textiles* was in our opinion, of little assistance to the appellant's case as there was no conclusive evidence to show that the insured had set fire to his own premises.

[14] In our judgment, we agree with the learned judge's finding that the appellant merely suspected that the respondent was the arsonist. It does indeed go without saying that a case is not proven based on a mere suspicion and that is trite law and indeed, a fundamental tenet of the rule of law. Save for the evidence that the investigation by the authorities showed that the fire was the result of arson, there was, as earlier stated, no evidence to show that it was the respondent which had set fire on their premises. The learned judge correctly took into account the irrefutable fact that the factory was located on a very large tract of land comprising about 20 acres and that there was absolutely no evidence that an intruder could not get access to the factory adding that anyone could have started the fire.

[15] To digress a little at this stage, we wish to emphasise the point that when the appeal came up for hearing before us, the law on the applicable standard of proof in civil cases where fraud is alleged had changed in view of the Federal Court's decision in *Sinnaiyah*. We are mindful of the fact that the Federal Court in *Sinnaiyah* had clearly decided that the decision applied to future cases. We nevertheless considered the phrase 'future cases' to cover an on-going appeal such as the appeal before us. We find support in this premise in the Court of Appeal's decision in *JCT Limited v Muniandy Nadasan & Ors and another appeal* [2016] 3 CLJ 692 which decided that the words 'future cases' encompassed an on-going appeal. Therefore, as far as this appeal is concerned, we are duty bound to apply the law as it presently stands. Reverting to the issue

whether the allegation of fraud was established, having considered the evidence, and even by applying the balance of probabilities standard of proof, we are completely satisfied that the appellant had failed to prove fraud against the respondent. The appellant had thus failed to pass the threshold of standard of proof presently applicable in civil cases in order to prove fraud against the respondent.

FINANCIAL POSITION OF THE RESPONDENT

[16] We were pressed with the argument that the respondent's financial standing prior to the fire was a clear motive in their act of submitting a fraudulent and exaggerated claim. It is to be noted that the respondent, on this point, did not deny that their finances were not that favourable. However, contrary to this argument, the evidence revealed that the respondent was a going concern which had since the fire, settled all its debts to its financiers. PW12 who was the auditor for the respondent testified that the respondent, being a wholly owned company of its public listed parent company namely DPS Resources Bhd, could employ several steps when in need of cash, such as capital injection, cash call and sale of a few assets to improve cash flow. These were indeed more viable and better options than to claim for the sums insured where the insured would only be paid between 65%–75% of the claim and the remainder was selfinsured which would mean that the respondent would still suffer losses between 25%–35%. The learned judge had rightly remarked, 'I don't see how the payment of RM19m will make the plaintiff's debt disappear'.

[17] We would say that even the appellant's witness namely Lee Song Yik ('DW6') in this regard, agreed that there were other avenues available to raise financing such as capital injections and debt restructuring. Also, it was in evidence that most of its debts were owed to its parent company namely DPS Resources Bhd which was not going to suddenly demand repayment from its wholly owned subsidiary. It was therefore wholly erroneous for the appellant to contend that the learned judge was not right to consider the self-serving statement that the respondent was a going concern which had other means to raise money.

[18] Taking into account the above factual scenario, it would seem clear that it would make no commercial sense for the respondent to set their own premises on fire. The unfavourable financial standing should not and could not amount to grounds for alleging fraud. The adjusters' allegation that the respondent was in the red and that it brewed motive was therefore wholly devoid of any merits. Furthermore, Lee Kam Wah who prepared the adjusters' report was not called to testify. The reliance by the appellant on this unproven motive was a failure from the outset. We are entirely in agreement with the learned judge's finding that:

Despite being handicapped by the fire, the business continued on till today. The plaintiff had more or less about 400 workers. This fact alone is inconsistent with someone who had a motive to burn their own factory. This is not a case of a company being burnt today and close its business the next day.

WHETHER THE FIRE WAS STARTED WITH THE RESPONDENT'S CONNIVANCE

[19] The appellant had alleged that the fire occurred as a result of the respondent's connivance or involvement based on two issues and these were, firstly the fires were as a result of recurring fires far in distance and time and secondly that the respondent's premises were cordoned off to everyone else but the police, Fire and Rescue Department and the owner of the respondent, as such subsequent fires must have been started by the respondent. The respondent, it is to be observed, did not dispute that there were several seats of fire that occurred at the respondent's premises.

[20] The premises, as we have mentioned earlier, occupied a large area of approximately 20 acres. There was no evidence led by the appellant to establish the number of guards that were engaged by the respondent for the said premises which comprised numerous factories erected thereon. To say that the premises were cordoned off and as such only the respondent could have set the place on fire was an unacceptable assumption bereft of any supporting documents or evidence, in light of the reality that even guarded and gated premises could be broken into. The appellant continued to allege that as it was guarded, there was exclusivity of access but the appellant had never led evidence to establish that the entire premises was cordoned off. The evidence adduced by the respondent showed that only the places that were on fire were cordoned off. PW5 testified that only a yellow tape was put at the scene to restrict access to the site affected by the fire. It was therefore clear that the said area was cordoned off by merely placing the yellow tape and to the extent that only the owner of the respondent had access to the premises whilst anyone could undeniably cross the said yellow line. PW25 even testified that Lee Kam Wah from the adjusters had visited the site from time to time and had access to it. Even PW6 had testified that the police were not able to keep everyone away from the premises, but they did their best to let the public view the fire from a safe distance. It was little wonder that the learned judge was driven to the conclusion that based on the evidence before the court, anyone could have started the fire. That was a finding of fact based on what had transpired during the trial in the court below and the available evidence placed before the court. The learned judge had in her decision clearly stated that 'although it was a guarded premises, there was no evidence that anyone could not get access to the factory. I was of the view that anyone could have started the fire'.

[21] That the fire was a result of arson could not be denied. This was an

irrefutable fact. In fact PW20 of the forensics team from the Fire and Rescue Department and PW6 from the Royal Malaysia Police both testified that the fire was a result of arson, however there was no evidence of any accelerant used to aid the spread of fire. Furthermore, PW6 had testified that although it was arson, the source and arsonist remained unknown.

[22] PW20 in his evidence testified that the investigation had continued for a period of two weeks and was completed by 1 August 2011. Even up to the completion of the investigation, PW20 testified that there were still hot ambers as a result of the fires and wind as well as the hot ambers played a vital role in the fire. It was also not disputed that almost at all times during the fires, the Fire and Rescue Department personnel were present at the respondent's premises. It must have been a very bold act, so to speak, for the respondent to be able to start the fire at any part of their premises whilst the personnel of the Fire and Rescue Department were carrying out firefighting efforts at the scene of the incident. To reiterate, the allegation that the respondent was the arsonist remained as a mere suspicion. There was absolutely no evidence that could lend credence to the suspicion or otherwise convincingly convert this suspicion into a proven fact.

DUBIOUS QUOTATIONS

[23] The appellant argued that, in an attempt to submit a fraudulent claim, the quotations submitted by the respondent were dubious. The respondent in this respect had in fact made available all the witnesses issuing the quotations and all of them had confirmed in their testimony that they were never contacted by the appellant's adjusters on their quotations. The appellant, it is to be noted, did not even cross-examine the said witnesses namely PW14, PW15, PW16, PW17, PW18, PW19, PW23 and PW27 on their evidence regarding the failure of the adjusters to contact them and on their quotations. As for the dubious quotes, the appellant had singled out two quotation providers, namely Instant Proceeds Sdn Bhd and Sunrise Point Sdn Bhd.

Instant Proceeds Sdn Bhd's quotations

[24] The appellant contended that the quotations in question, that is exhs P77, 78 and 79 supplied by Instant Proceeds Sdn Bhd ('Instant Proceeds') were dubious and questionable. The co-owner of Instant Proceeds, PW27, confirmed that the quotations were prepared and sent by her to the respondent. These quotations were for the reconstruction of Kiln Dry plant ('KD plant') ('exh P77'), for removing, repairing, rewiring, reinstalling electrical and repainting building at Lot 69 etc ('exh P78') and for reconstruction of existing buildings ('exh P79').

[25] A main plank in counsel's submission on this issue was that instant proceeds was not a legal entity at the time the relevant quotations were issued. These quotations were therefore invalid or at the very least were dubious and questionable. We would make the true facts known at this stage, that the evidence led in particular the necessary forms lodged with the Companies Commission of Malaysia, revealed that there was a change in name from Instant Proceeds to Instant Resources Sdn Bhd and to its present name as Green Living Sdn Bhd. However, this change of name, in our opinion, did not at anytime make Instant Proceeds to be an invalid entity or dubious as was alleged by the adjusters. The only argument raised in support of this allegation was that Instant Proceeds had changed its name twice and as such, using its old name made it an invalid entity. The company, in our judgment, was a valid and an existing entity before the law as it merely involved a change of name. Besides, not only did the letterhead of Instant Proceeds carry the contact number of PW27, it also had its company number. It was the adjusters' misleading report that found that there was no such company when a simple check with the Companies Commission of Malaysia using the same company number would have revealed that the company did indeed exist at the material time.

[26] The learned judge, in our opinion, correctly pointed out that the adjusters had taken a simple approach of reporting that Instant Proceeds did not exist instead of stating that the company had changed its name. PW27 further testified that neither the adjusters nor the appellant had contacted her with regard to her quotations on her mobile telephone number that she still used which was stated in the quotations. PW27 additionally testified that the name of the company Instant Proceeds was still being used as EPF and SOCSO payments were made using letterhead bearing the said company's name and letters received were addressed to Instant Proceeds until the date of the trial. PW27 had also explained that although the company's name was changed twice, she opted to maintain the old name due the fact that Instant Proceeds was better known to its customers and her belief in the Chinese Feng Shui. The appellant, we find, had failed to adduce any evidence to support their allegation. Accordingly, we are entirely in agreement with the finding made by the learned judge that the quotations were not dubious nor questionable. We also hold that as the quotations were prepared and sent by PW7 to the respondent and that PW7 was the de facto owner of Instant Proceeds, she was the right person to testify on the quotations.

[27] The appellant had also raised the issue of the scope of work or the nature of business of Instant Proceeds which apparently only involved processing and trading of wood products. This scope of work, the appellant submitted, had disallowed Instant Proceeds from doing other business such as building a KD plant and construction. PW27 in her testimony, however, replied that

'Trading' also fell within the scope of construction. She explained that although the company search showed that the scope of business of Instant Proceeds was in processing wood works, the memorandum and articles of association of Instant Proceeds encompassed trading, which covered a wide area of work. Therefore, we do not think that anything material turned upon the argument of the appellant's counsel that Instant Proceeds' scope of business was limited. The finding of the learned judge that 'it does not make sense for PW27 who is not an interested witness to issue a quotation for works that they cannot carry out or not their business to do' is undoubtedly correct and not convincingly refuted as there was no evidence led by the appellant that PW27 had any interest to assist the respondent in supplying the quotation for works that her company was unable to carry out. PW27 rightly stated that 'That's mean everything ada untung saya pun boleh buat'. which was a sensible business approach amongst business people that any business opportunity available that was within their means should be attempted.

[28] The appellant had also made an issue out of the fact that Instant Proceeds had also operated from the respondent's premises. PW7 when examined on this point clarified that Instant Proceeds supplied white parts to the respondent and for this purpose they processed the product at the respondent's premises. PW4 had admitted and explained that Instant Proceeds produced the white parts which were semi-finished products using his expertise and Instant Proceeds paid the salary of the workers trained by them to perform the work on the white parts. The appellant, in our opinion, had unjustifiably alleged fraud merely because Instant Proceeds had carried out work from one of the respondent's building. It is not uncommon, we would say, for a company the size of the respondent to have outsourced vendors providing services and products from their premises.

[29] On the whole, the appellant's submissions relating to the issues affecting Instant Proceeds are, for the foregoing reasons, wholly unmeritorious and baseless.

Sunrise Point Sdn Bhd's quotations

[30] The appellant had questioned the genuineness of the quotations of Sunrise Point Sdn Bhd ('Sunrise Point'). It is clear to us that the issues raised were identical to the issues raised in Instant Proceeds in that Sunrise Point's nature of business was only a manufacturer of furniture and table legs and could not therefore issue quotations beyond that scope of business. Sunrise Point was also operating within the respondent's premises. Pausing here, it is undeniable that any business entity is entitled to venture into any available business opportunity and it ought not to be restricted in its trade. The respondent was a large company and had outsourced part of its work to Sunrise

Point which provided their services and expertise in one part of the processing works and supplied to the respondent a partly completed product which the respondent then completed. The mere fact that Sunrise Point was the respondent's vendor did not entitle the appellant to impute the burden on the respondent that they should stop Sunrise Point from issuing a quotation on plant and machinery. The appellant, we observe, had also failed to prove as to how the issuance of a quotation from a separate and disinterested entity which the respondent had absolutely no control showed that the respondent had the intention to submit dubious quotations. There was no fraud in providing quotes for work which Sunrise Point represented that it could do at a competitive price.

[31] Sunrise Point's quotation, nevertheless was not marked as exhibit by the learned judge as it could not be admitted into evidence because its maker could not be called. Besides, it ought to be highlighted that although the respondent had forwarded a copy of the quotation from Sunrise Point to the appellant, Sunrise Point was subsequently wound up and a liquidator was appointed on 13 August 2012. The respondent had attempted to trace all the directors but was unsuccessful. We consider that these quotations should appropriately be determined as an issue before the High Court in assessing appropriate quantum of damages to be awarded to the appellant.

FAILURE TO PROVIDE DOCUMENTS

[32] The appellant raised the issue of non-cooperation on the part of the respondent when it was alleged that the respondent withheld documents despite continuous reminders. As the evidence had manifestly shown, the adjusters wrote for documents when having been on the site and had knowledge that the fires were still raging since 10–14 July 2011. They had requested for documents on 11 July 2011 giving 14 days to the respondents to provide the same. The learned judge rightly held that it was unreasonable to expect documents during the period when the fire was still raging. In fact there were numerous letters requesting for more documents and detailed quotations which kept the respondent in an endless loop of paper work and submission that never satisfied the adjusters. DW5 in her testimony agreed and admitted that most of the letters referred to in her witness statement were actually requests for further documents and more detailed quotations. The appellant claimed that the respondent refused to cooperate. They however, were aware and in fact the learned judge acknowledged that the claim was large and that the respondent needed time to submit documents. The appellant too in this regard undeniably needed time. This is clearly demonstrated by their letter written to the respondent wherein it was stated 'it was hardly 2¾ months since those important documents were received from you. Taking into account of your latest updated We hope you will bear with us for the time being'. Thus, even professionals who handled fire claims on daily basis required time and 2¾

months was a reasonable time to the appellant. They could have afforded the respondent similar understanding and time to obtain documents and quotations from third parties. The respondent through their employees, being layman would certainly need time to compile documents and necessary information sought by the adjusters.

[33] The learned judge commented, and we think she was right, that the appellant chose not to highlight to the court below an email dated 19 February 2012 from the managing director of the adjusters namely Lee Kam Wah wherein it was stated 'We are not saying that the participant had not cooperated with us and has not submitted anything to date' and held that this was a clear admission by the adjusters that the respondent had cooperated and had been submitting documents as requested. The learned judge had also found that the respondent's claim was huge and they would require time to produce the documents. However, the appellant, according to PW25, continued to make endless requests for more documents and more detailed documents. This fact, as we had mentioned above, was admitted by DW5. This had prompted PW25 to write a letter on 6 March 2012 requesting for meeting to iron out what were the documents required. However, the request was turned down.

[34] We do not consider such request and delay in providing the documents a blatant disregard of any express term of the Takaful contract. The appellant, as we have shown above, was also slow in processing the claim and the evidence of PW11, the respondent's appointed broker was very clear on this fact. The respondent's letter dated 6 March 2012 which stated that they would not submit any more documents in relation to the claim other than those they had submitted, 'unless a meeting involving all parties is called to clarify the outstanding issues pertaining to the fire claim' was not an ultimatum nor a refusal to cooperate, but was, in substance, a clear request for a meeting to address outstanding issues. In our judgment, it would be unthinkable for the respondent to give the alleged ultimatum or refuse cooperation and thereby risked repudiation of the Takaful policies when they had already suffered huge losses due to the fire and any payment of compensation from the appellant would greatly help them to mitigate their losses. In the premises, we are fully satisfied that the learned judge had correctly considered and addressed her mind to the weight to be attached to the evidence tendered and made a correct finding of fact. The appellant, on the contrary, had failed to prove their pleaded defence on this issue.

DUBIOUS CLAIM FOR CCTV AND OFFICE EQUIPMENT

[35] The respondent had initiated a claim for damage caused to its CCTV system at their premises. PW10 who testified on behalf of the respondent on

the matter told the court that there were 55 CCTV cameras which were damaged as a result of the fire. He had also referred to exhs P28 and P30 to show that 55 cameras were damaged. This claim was disputed by the appellant. DW2 testified on behalf of the appellant that he had inspected the damage to the CCTV system. In his letter to the adjusters dated 18 December 2011 ('exh D82'), DW2 had reported that there were 85 CCTV cameras. We may mention in this connection that contrary to his exh D82, the quotation submitted by the respondent as clearly demonstrated in contemporaneous document ('exh P30') plainly showed claim for 55 CCTV cameras only ('exh P30'). The information relating to the 85 CCTV cameras, according to DW2, was given to him by the respondent. However, DW2 agreed that there was no documentary proof to support this allegation. The learned judge correctly held that DW2 was not a credible witness when he came up with three different figures of 30, 55 and 85 CCTV cameras which he could have verified from the correct respondent's personnel such as PW25. We agree with the learned judge's decision in rejecting DW2's letter, that is exh D82, and in accepting PW10's evidence that there were 55 CCTV cameras that were damaged as a result of the fire and not due to wear and tear. This was a finding of fact and there were no cogent reasons upon which such finding could be reversed.

[36] The appellant had further contended that the damage to three digital video recorders ('DVR') was inconsistent with the damage due to mishandling during the fire incident. DW2 in his report ('exh D82') gave three reasons to support the above contention. These are:

(a) nobody except PW25, his family members and the IT staff knew the DVR system was not accessible to their general workers during the fire and could not have been mishandled;

(b) the connectors and coaxial cables were still intact and in good condition; and

(c) the contents of the three hard disks indicated that two of the DVR systems had stopped recording in 2005 and another in 2007.

[37] However, in his testimony, DW2 agreed that there was a possibility that items like DVR could have been damaged by mishandling due to emergency whereby the items were hurriedly moved and also when any of the DVR fell or grazed into some objects the hard disks could have been corrupted. The respondent had established that the moving of the office equipment was done as the result of the fire at the premises and the fear that the same would be destroyed. It must be noted that the premises were on fire and in a frenzy to save office equipment, it was manifestly necessary to remove it, which unavoidably, had to be done in a rush. As such the damage was a direct result of the fire at the premises and was therefore covered under the policy. The appellant's attempt to

show that there was no real risk of damage was, with due respect to learned counsel, baseless and not convincingly substantiated. The respondent, while being insured, was duty bound to mitigate losses and moving the equipment during the fire was a natural step towards mitigating their losses. There was, as it seems to us, no reason to justify the contention that the claim under the all risk certificate was not within the ambit of the certificate.

LAMINATION PRODUCTION AREA

[38] It was the appellant's contention that the respondent had made a claim for the lamination production area which the adjusters had alleged was not damaged by the fire. The adjusters in this regard carried out fire forensic investigation. A report on fire investigation dated 1 February 2012 ('exh D87') was prepared by DW3. The report stated that the lamination production area was intact with no heat and water damage. The respondent, however, was unaware of the damage to the lamination production area during the fire until a heavy downpour brought the roof down. A claim was therefore submitted on 27 October 2011. Prior to the report dated 1 February 2012 ('exh D87'), on 30 January 2012, DW3 received a request from Lee Kam Wah for a report on the damage to the lamination production area based on photographs taken around 27 July 2011 by DW3 and Lee Kam Wah. These photographs were exhibited in the said report. DW3 admitted that he did not go to the site to investigate the claim but relied solely on his photographs and what he saw on 27 July 2011. It is pertinent to note that DW3's report dated 1 February 2012 was made based on the photographs taken almost seven months prior to the said date at which point in time, there was no claim filed for the lamination production area. The claim, as earlier — mentioned was filed on 27 October 2011.

[39] DW3 admitted that when the photographs were taken on 27 July 2011, he was not aware of any damage claim for the lamination production area and as such, did not investigate the damage to the roof of the lamination production area. DW3 had also testified that the photographs were taken by him and Lee Kam Wah when they were having a walk about at the respondent's premises on 27 July 2011. Obviously both DW3 and Lee Kam Wah could not possibly have put their mind to the damage to the roof when they took the photographs as there was no claim filed by the respondent at that point in time.

[40] DW3 further in his testimony testified that in concluding that there was no fire, he had relied on the plastic sheets covering timber stacks seen in the photographs which were not damaged by the fire. DW3 further agreed that he had not inquired when the timber was stacked and agreed that it could have been stacked after the fire. DW3 also relied on the photographs alleging that the lighting was working and there was no damage to the wiring. However,

when it was pointed out to him that a few lights that were not lit, DW3 agreed and went on to allege that they were switched off but confirmed that he did not verify as to whether they were damaged or switched off. DW3 also agreed that part of the ceiling shown in the photographs were darker.

[41] We are consequently led to one glaring conclusion that the only clues relied upon by DW3 in determining that the lamination production area was not affected by the fire proved to be a shoddy investigation with mere reliance placed on photographs that were taken before DW3 was informed of the damage and hence could not have put his mind to such damage when taking these photographs. The learned judge had correctly held that the evidence of DW3 and the report were purely an assumption based on the photographs. We would necessarily add that a prudent and independent investigator would have visited the site when the claim was made to verify the same. As DW3 had admitted, the report was based on the photographs taken earlier, in our opinion, it was at best an assumption based on the photographs and the reliance on the same did not help the appellant a bit.

CLAIM FOR FENCING

[42] The respondent had made a claim for the damage to the 650ft fencing. To support the claim, the respondent had tendered a quotation ('exh P42') from Kennico Engineering Construction and made available the witness at the trial that is PW14. The appellant merely put to PW14 that the damage to the metal cladding was only 40ft, to which PW14 disagreed. PW14 testified that he visited the site and had taken the measurement of 650ft fencing which was calculated to be damaged by the fire, hence the claim. The appellant, on the contrary, produced two photographs ('exh D87') to show that the damage to the metal cladding was only 40ft.

[43] DW6 in his evidence was asked if there was any photograph to show that the 650ft of fencing was not damaged to which DW6 answered in the negative and further said that it was 'not in the report'. When he was questioned whether the adjusters mentioned anywhere in the report that the claim of 650ft damaged fencing was investigated, DW6 once again answered 'not stated in the report'. DW6 had also testified that the adjusters' report omitted to mention the appellant's allegation that 650ft of fencing was not damaged. If indeed it is true that the 650ft of fencing was not damaged by the fire, it would be logical to conclude that any sensible adjuster would have stated such an important finding in their report. The omission by the adjusters to mention about their finding would go to show that there was no investigation being carried out to determine the extent of the damage or if there was, the result showed that their allegation was baseless. They had instead opted to pick and choose two photographs that could justify the repudiation of their liability.

These photographs did not specify the exact location where it was taken. The respondent through PW25 had referred to a layout plan that was marked as exh D6A which had highlighted the damage fence area. PW14 had also testified that he had visited the site two or three days after the fire and had taken the measurement himself. His evidence was hardly challenged. We agree with the finding of the learned judge that the two photographs did not support the appellant's contention. In our opinion, the two photographs could hardly be used as evidence to prove the appellant's case on this point. The learned judge's rejection of the appellant's contention was in our opinion correctly premised on the facts and evidence placed before the court.

ADJUSTERS' REPORTS

[44] The learned judge, in rejecting the adjusters' report, arrived at her decision as clearly laid out in the grounds of judgment by evaluating two different issues. These are firstly, the non-fulfilment of the conditions set out in s 73A(1) of the Evidence Act 1950 and secondly, the rejection of DW6's evidence. There were four reports prepared by Lee Kam Wah, the general manager of the adjusters (exhs D89, D90, D91 and D92). The evidence led revealed that Lee Kam Wah was no longer working with the adjusters. When the appellant sought to admit these reports, it was not denied that the said reports had been prepared by Lee Kam Wah who was also the person investigating the fire claim filed by the respondent. However, DW6 namely Lee Song Yik had testified that the adjusters was not able to trace or track the whereabouts of Lee Kam Wah. The appellant then sought to adduce the said reports through DW6 who testified that he had personal knowledge of the matters referred to in the said reports.

[45] The appellant had, however, failed to ensure the presence of Lee Kam Wah. DW6, on this issue, testified that the adjusters had attempted to contact Lee Kam Wah, but were of no avail. He further testified that 'I believe he has migrated to United States of America' and 'I do not know his current address in the USA and I believe it would not be reasonably practical to secure his attendance in court' and also 'I have personally taken all reasonable steps to locate him but without success'. Nevertheless, DW6 added that there was no documentary evidence of the efforts employed by the adjusters in locating Lee Kam Wah. Further in his evidence, DW6 admitted that he did not make any search at National Registration Department, Immigration Department nor seek the assistance of Wisma Putra to locate Lee Kam Wah in the United States. We would emphasise that this evidence goes to show that DW6 had not taken 'all reasonable steps' or efforts to find Lee Kam Wah.

[46] The appellant relied on the proviso to s 73A(1) of the Evidence Act 1950 in order to admit the reports as evidence. For convenience, we reproduce

the relevant extracts of s 73A(1) below:

> 73A Admissibility of documentary evidence in civil cases, etc.
>
> (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
>
> (a) if the maker of the statement either —
>
> (i) had personal knowledge of the matters dealt with by the statement; or
>
> (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and
>
> (b) if the maker of the statement is called as a witness in the proceedings:
>
> Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

[47] Based on the proviso, since Lee Kam Wah was beyond the seas and it was not reasonably practicable to secure his attendance, the appellant had to show that all reasonable efforts to find him had been made but without success. The appellant obviously had failed to show that they had made all reasonable efforts to find Lee Kam Wah. The learned judge therefore, was correct when she held that the conditions set out in the proviso to s 73A(1) of the Evidence Act 1950 had not been fulfilled.

[48] Despite Her Ladyship's ruling that the reports were inadmissible, she nevertheless continued and came to her finding of fact, after witnessing first hand demeanour of DW6, that this witness was not a credible witness. This issue came about amidst the appellant's attempt to tender the reports through DW6 who claimed to have personal knowledge about the contents of the reports. During cross-examination, DW6 took a very long time to answer questions on the correctness of the statement of facts made by Lee Kam Wah in the reports. DW6 further took a long time to answer straightforward questions and also did not directly answer the questions posed by learned counsel for the respondents during cross-examination. The learned judge constantly reminded the witness to give the answers quickly. Additionally, DW6 continuously

insisted that there were documentary evidence but could not produce when asked to do so. Further evidence was led to show that DW6 also didn't go to the respondent's premises to conduct the investigation. The learned judge, in this respect, rightly concluded that 'DW6 is not a credible witness'; 'He could not be believed at all'. Under the circumstances, the learned judge's decision in rejecting the reports prepared by Lee Kam Wah and in disregarding the evidence of DW6 was correct. However, assuming for a moment that the reports were admissible, it is our finding that there was ample evidence as alluded to earlier in this judgment to show that the appellant was liable under the Takaful certificates to indemnify the appellant for the losses and damage they had suffered as a result of the fire which occurred on their insured premises.

[49] Having carefully considered the oral and written submissions of both learned counsel and perused the evidence, we are in full agreement with the learned judge so far as her findings of liability of the appellant under the three Takaful certificates or policies are concerned even by applying the standard of proof of balance of probabilities. We arrive at this decision unanimously as it is now obvious that the learned judge's findings were supported by the oral and documentary evidence adduced by the respondent during the trial.

QUANTUM

[50] The respondent had allegedly suffered losses and damages amounting to RM24,219,074 as a result of the fire. According to the learned judge, PW25 had informed that the total amount claimed by the respondent was RM19,496,398.90. The learned judge wholly accepted the respondent's quotations submitted by the contractors as representing the amount of losses suffered by the respondent and that amount was RM19,496,398.90.

[51] In the course of the trial and after the respondent had closed their case, the appellant sought to produce a report on quantum prepared by the adjusters. The respondent had attributed the late production of the quantum report to an administrative oversight. The learned judge, finding the respondent's conduct as lacking bona fide and not transparent, rejected the explanation. Consequently, the quantum report was not admitted in evidence. The learned judge, in rejecting the report, had also stated that she could not allow the production of the same as none of the respondent's witnesses were given a copy of the report, the respondent had no knowledge of the contents thereof and the report was prejudicial to the respondent. Her Ladyship, we find, did not give any reason as to why she thought the report was prejudicial. Despite the request by the appellant for the damages to be assessed, she gave a terse response of 'why should I' in her grounds of judgment. The learned judge had also stated that the appellant could have easily produced counter quotations from contractors

of their own choice, yet it was not done. Accordingly, since there were no quotations from the appellant to rebut the respondent's claims, the learned judge wholly accepted the respondent's quotations as representing the amount of losses suffered by the respondent as mentioned above and proceeded to allow the claim on the reduced sum of RM19,496,298.90.

[52] The irony is that, while the learned judge had clearly said that the appellant could have produced their own quotations to rebut the respondent's claims, she ignored the potential material evidence sought to be adduced in the form of the quantum report that could probably rebut the respondent's claims and chose to reject the said quantum report on the ground of delay, unproven prejudice and lack of bona fide. The learned judge's decision on quantum was made in the absence of material and relevant evidence in the form of the quantum report which would have made substantial difference to Her Ladyship's decision on the issue of quantum given that the adjusters had carried out independent investigations and adjusted the respondent's claims under the Takaful certificates which were lower than the amount allowed by the learned judge.

[53] The rejection of the quantum report which is crucial towards a fair and proper assessment of the respondent's claim was extremely improper. The point of importance that had emerged from such improper dismissal of evidence was that it led in consequence to the award of damages without full, proper and fair appreciation of evidence as regards the appropriate award to be given. Needless to say, such improper rejection of crucial evidence was at the expense of the appellant and justice as they had been deprived of the opportunity to adduce evidence to counter the evidence of the respondent in connection with quantum which she erroneously and improperly accepted.

[54] The learned judge with respect, had misdirected herself on the principle of law when she imposed a burden on the appellant who was the defendant to disprove the respondent's claim on quantum. A claim for damages is governed by s 12 of the Evidence Act 1950 which reads:

> In suits in which damages are claimed any fact which will enable the court to determine the amount of damages which ought to be awarded is relevant.

The duty is on the party claiming damages to prove the fact of the damage and the amount of damages (*Augustine Paul On The Evidence, Practice And Procedure* (4th Ed, Lexis Nexis) at p 159). This principle is clearly enunciated by Ong Hock Thye FJ in *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 at p 100:

> The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in

proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would only recover nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only.

The principle was held in the words of Abdul Malik Ishak JCA in the case of *Aseambankers Malaysia Bhd & Ors v Shencourt Sdn Bhd & Anor* [2014] 4 MLJ 619; [2014] 2 CLJ 773 as follows:

It is trite law that a plaintiff seeking damages in a court of law has the burden of proving both the fact and the amount of damages before he can recover such damages.

[55] The Federal Court in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15 (FC) demonstrates once again the need to prove damages to the hilt. In a well-written judgment, Edgar Joseph Jr FCJ sets out the principles lucidly. His Lordship had this to say:

Firstly, that part of the judgment of the judge which provides that the vendor shall pay to the purchaser damages to be assessed for wrongful termination of the agreement with costs and that Tan Sri Khoo and the vendor shall pay to the purchaser damages to be assessed for breaches of the undertakings, even though affirmed on appeal, can in no way relieve the purchaser of satisfying the fundamental requirement of having to prove its loss (if any) arising from those breaches. To hold otherwise would amount to dispensing with proof of quantum altogether, and that cannot be the law. In so saying, we are reminded of the words of Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 at p 178:

> ... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

Similarly on the present facts before us, the respondent had to first prove that the items that they were claiming for had in fact been damaged by the fires and then prove the quantum for the necessary repair or replacement.

[56] Further, the learned High Court judge had erred when Her Ladyship held that the appellant had failed to provide counter-quotations where in fact it was Her Ladyship's decision to reject the adjusters' counter report on quantum and the relevant evidence therein. The appellant had been placed in an extremely awkward and prejudiced position. The decision is undoubtedly inconsistent with the clear stipulation of s 12 of the Evidence Act 1950 that any such fact which will enable the court to determine the amount of damages which ought to be awarded is relevant.

[57] With reference to the case authorities cited above, the respondent as the plaintiff in this case bears the burden of proving its quantum. It is a burden of proof that lies with the respondent throughout the proceedings. This principle was clearly enunciated in the case of *Regina Fur Co Ltd v Bossom* (1958) 2 Lloyd's 425 wherein Lord Evershed MR said:

> I think that a defendant-whether he is an underwriter or any other kind of defendant is entitled to say by way of defence, 'I require his case to be strictly prove, and admit nothing'. Where such is the defence, the onus remains throughout upon the plaintiffs to establish the case they are alleging.

In the Malaysian case of *Eastern Enterprises Ltd v Ong Choo Kim* [1969] 1 MLJ 236, Winslow J had made the decision at p 244 as follows:

> I accordingly find that the plaintiff [sic] have not discharged the burden of proving a case against the defendant in the first place ...
>
> No burden accordingly shifts to the defendant ... the defendant would not have to disprove something which has not been proved against him.

Therefore, the learned judge had erred in making a finding that in the absence of any counter proposal or quotations from the appellant, the respondent's quotations had to be accepted to be the truth in terms of quantum. The learned judge had failed to appreciate the totality of the evidence presented to find that the respondent had failed to discharge the onus of proof imposed on them as a plaintiff in respect of the quantum of claim.

[58] Despite the fact that the respondent was relying on quotations to prove its case, some of the respondent's supplier witnesses gave evidence that part of the works had been completed where logically there would have been receipts and invoices on the same. However, when cross-examined on the issue, the respondent's supplier witnesses were unable to produce any invoice and receipt to substantiate their allegations. Amongst others, Kan Kok Keong ('PW14') who gave evidence on behalf of Kennico Engineering Construction, one of the suppliers who provided the quotation to the respondent, claimed that he had repaired the respondent's machineries but when he was asked to show any proof of such work, he changed his stance by giving a confusing statement that no such work was carried out because this was only a quotation. It would be insufficient for the respondent to merely rely on the very vague recollection of quotation suppliers where most of them could not even confirm if works had been carried out by them and if so, to what extent and also why there were no invoices and receipts issued. The learned judge, as it is clear to us, did not address her mind to this crucial evidence in dealing with the issue of quantum.

[59] The respondent had tendered as evidence numerous quotations provided by various parties to prove their claim. However, upon close

examination of the quotations, it was noted that the items stated in the quotations had been quoted repetitively and there were also overlapping of items in the quotations produced by the suppliers, which the learned judge failed to consider. The item 'dismantle and re-construction of the 20 units KD plant' on the respondent's premises, was repeated in the quotations tendered by the respondent from the suppliers which were supposedly different entities (see exh P40 and P41 submitted by Kennico Engineering Construction dated 4 August 2011 and 23 August 2011, exh P46 submitted by Wing Seng Engineering and Construction Works Sdn Bhd dated 5 August 2011, exh P49 submitted by Eka Raya Sdn Bhd dated 8 August 2011; and exh P77 submitted by Instant Proceeds Sdn Bhd dated 1 August 2011). The mere fact of relying on quotations with repetitive items manifestly showed an exaggeration of the respondent's claim and was, as such, a double claim or unjust enrichment.

[60] Next, the items 'wiring, lighting, power point ...' on the respondent's premises, were repeated in the quotations tendered by the respondent from two different suppliers. The quotations were from Tekpol Electrical Sdn Bhd dated 26 July 2011 with the subject 'QUOTATION FOR CADANGAN TAMBAHAN PADA KILANG YANG SEDIA ADA DI ATAS LOT 1629' ('exh P47') and Kennico Engineering Construction dated 19 October 2011 with the title 'RE: SUPPLY AND RE-CONSTRUCT AND REPAIR 1 Lot 76, 77, 78 (1629) ...' ('exh P43'). The total sums in the above-mentioned quotations were accounted into the respondent's claimed sum which was allowed by the learned judge despite repetitive items claimed in respect of the same.

[61] In addition to the above issues, the appellant had also raised the issue with regard to claims which were alleged to be unrelated to the fires. According to the appellant, several supplier witnesses gave evidence that some of the items in their quotations did not relate to items damaged by the fires. Consequently, these items should not be claimable under the Takaful certificates. Lam Yet Lan ('PW17') for Tekpol Electrical Sdn Bhd who gave evidence on the quotation which referred to a 'Quotation for Cadangan Tambahan Pada Kilang Yang Sedia Ada' ('exh P47') very simply stated that it was a quotation for an 'extension' to the existing building. It would appear that this quotation had nothing to do with repair works due to the fire incidents. This is further supported by the fact that the works included the TNB sub station where in fact it was never the respondent's case that the sub station was affected by the fire. Further, Ng Kon Beng ('PW19') who testified on behalf of Eka Raya Sdn Bhd confirmed that the invoice and delivery order ('exh P50') for the boilers was for work done in year 2008 which was well prior to the fire. Therefore this document was wholly irrelevant to the present claim and ought to be disregarded. PW19 had said, in any event, that this document related to overhaul work which had to be conducted every year, irrespective of whether

there was a fire as such the inevitable conclusion that could be drawn from this evidence was that the claim was totally unrelated to the fire.

CONCLUSION

[62] In light of the above, we are satisfied that, on the issue of liability, there was ample evidence to prove that the respondent had suffered losses and damage due to the fires which occurred on their premises at the relevant time. We unanimously agree with the findings of the learned judge that the appellant was liable under the three Takaful certificates or policies. However, as far as the issue of quantum is concerned, we find that the learned judge had erred in misapprehending the law and evidence in allowing the respondent's claim in the sum of RM19,496,398.90 based solely and entirely on the evidence of the quotations submitted by the respondent's contractors. The rejection of the appellant's adjusters' quantum report was in contravention of s 12 of the Evidence Act 1950 which treats such report as relevant in determining the appropriate damages to be awarded. The learned judge, moreover, had erred in imposing a burden on the appellant as the defendant to disprove the respondent's claim who bears the burden to prove their claim as the plaintiff. The other issues deliberated earlier, coupled with the above issue, would make it necessary for the appropriate quantum to be assessed by the trial judge. In the event, we allow the appeal in part. We affirm the decision of the learned judge so far as it relates to her finding of liability against the respondent under the three Takaful certificates or policies. However, we are of the unanimous view that appellate intervention is required insofar as the learned judge's decision on quantum is concerned. For the foregoing reasons, the appeal on quantum is allowed and we order that the case be remitted back to the High Court for reassessment of damages before another High Court judge, with liberty to both parties to adduce all relevant evidence for the purpose of assessment of damages. Interest on the judgment sum of 5%pa from 14 July 2011 until full realisation as ordered by the learned judge on 14 July 2011 is maintained. The decision of the learned judge dated 26 September 2014 is hereby set aside to the extent stated above. Since the appeal is allowed in part, we order that the costs of RM50,000 awarded by the learned judge be reduced to RM25,000 but we make no order as to costs for this appeal. The deposit is refunded to the appellant.

Appeal allowed in part.

Reported by Afiq Mohamad